IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 203

PHILIP PARIS, MILES A. ROGERS, HERMAN MEYRICH, JOSEPH H. LEVY, HARRY SCHECHTER and NATHAN ROSENBAUM, suing on behalf of themselves and all others similarly situated who may come in and contribute to the expenses of this suit,

Petitioners,

against

METROPOLITAN LIFE INSURANCE COMPANY, CECIL J. NORTH and E. J. NICHOLAS,

impleaded with

LEON W. BERNEY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

LOUIS B. BOUDIN,
Of Counsel for Petitioners,
1776 Broadway,
New York City.

INDEX

CASES CITED

STATUTE CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

PHILIP PARIS, MILES A. ROGERS, HERMAN MEYRICH, JOSEPH H. LEVY, HARRY SCHECHTER and NATHAN ROSENBAUM, suing on behalf of themselves and all others similarly situated who may come in and contribute to the expenses of this suit,

Petitioners,

against

METROPOLITAN LIFE INSURANCE COMPANY, CECIL J. NORTH and E. J. NICHOLAS,

impleaded with

LEON W. BERNEY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit rendered in the above suit on May 10, 1948, reversing a judgment of the District Court of the United States for the Southern District of New York in favor of Petitioners, and directing that the District Court retain the cause

pending the outcome of a suit directed to be brought in the New York Supreme Court; and from an order of the United States Circuit Court of Appeals for the Second Circuit entered May 28, 1948 denying Petitioners' motion for a rehearing and for an amendment of the transcript of the record.

The judgment of the District Court adjudged that Petitioners were entitled to a certain fund theretofore deposited by Metropolitan Life Insurance Company with Manufacturers Trust Company to the credit and subject to the order of Cecil J. North, E. J. Nicholas and Leon W. Berney, as escrowees, under a certain agreement made on July 19, 1944, by United Office and Professional Workers of America, with Metropolitan Life Insurance Company, and directed the said escrowees to distribute the said fund to certain employees of Metropolitan Life Insurance Company in accordance with the terms of the said agreement.

A.

Statement of the Matter Involved

Metropolitan Life Insurance Company (hereinafter sometimes referred to as "Metropolitan") is engaged in the life insurance business throughout the United States and in foreign countries, and in the course of its interstate commerce employs agents for the solicitation of business and the collection of premiums. United Office and Professional Workers of America (hereinafter sometimes referred to as "UOPWA") is a national labor union consisting of office and professional workers throughout the United States. Industrial Life Insurance Agents Union, Local 30 (hereinafter sometimes referred to as "Local 30"), is a local union consisting of industrial insurance agents in New York, and is an affiliate of United Office and Professional Workers of America. Local 30 is the duly certified collective bargaining agent of Metropolitan's agents in New York, while UOPWA is the duly cer-

tified collective bargaining agent of Metropolitan's agents in the States of Massachusetts, Connecticut, New Jersey, Pennsylvania, Michigan and Illinois. All insurance agents employed by Metropolitan throughout the country are required upon their employment to sign so-called "agency agreements" which define their duties and which specify the rates of commissions to be paid; and the plaintiffs and the persons on whose behalf they sue had signed such agreements prior to the certification of Local 30 and UOPWA as the collective bargaining representatives of Metropolitan's agents in the States above referred to. After its certification as the collective bargaining repretative of Metropolitan's agents in New York, and prior to October 24, 1942, a dispute arose between Local 30 and Metropolitan with respect to the amount of pay and other terms and conditions of employment of its New York agents, with the result that the said dispute was, on that day, certified by the Secretary of Labor to the National War Labor Board. Similar disputes arose between UOPWA and Metropolitan with respect to the amount of pay and other terms and conditions of employment of Metropolitan's agents in the six other States named, and the said disputes were similarly certified by the Secretary of Labor to the National War Labor Board. Thereafter the said seven disputes were consolidated and heard and decided by the National War Labor Board as one case.

On May 7, 1943, while the New York dispute was pending before the War Labor Board, Local 30 and Metropolitan entered into a collective bargaining agreement covering all terms of employment in dispute except that of wages, and as to that the agreement provided that "provisions with respect to compensation are being submitted to the War Labor Board"; and, thereafter, six similar collective bargaining agreements were entered into by UOPWA and Metropolitan, covering the agents in the six other States. Thereafter, on September 18, 1944, the National War Labor Board made an order directing an increase of pay of $2.85 per week for the agents involved in the said

seven disputes; and made the said increase of pay retroactive in the case of each dispute to the date of the certification of such dispute by the Secretary of Labor to the National War Labor Board.

During the pendency of the said matter before the War Labor Board, Metropolitan advanced a claim that it would be unable to comply with so much of a decision of the War Labor Board as would include retroactive pay, on the ground that it would be barred from making any retroactive payments by virtue of the provisions of Sections 213(7) and 213-a(5) of the New York Insurance Law.

Those sections provide:

"213. • • •

7. No such company, and no person, firm or corporation on its behalf or under any agreement with it, shall pay or allow to any agent, broker or other person, firm or corporation for procuring an application for a life insurance policy, for collecting any premium thereon or for any other service performed in connection therewith any compensation greater than that which has been determined by agreement made in advance of the payment of the premium, except that, if supervision over any outstanding life insurance by a local salaried representative of such company is discontinued, a premium collection or policy service fee may thereafter be paid on renewal premiums not exceeding two per cent of the renewal premiums actually collected on such insurance."

"213-a. • • •

5. No such company, and no person, firm or corporation, on its behalf or under any agreement with it, shall pay or allow to any agent, broker, employee or other person, for services in procuring an application for industrial life insurance, for collecting any premium thereon or for any other service performed in connection therewith, any compensation greater than that which has been determined by agreement made in advance of the rendering of such service."

Thereupon and on July 19, 1944, in anticipation of the decision of the War Labor Board, Metropolitan and UOPWA entered into an agreement reading as follows:

"STIPULATION BETWEEN UNITED OFFICE AND PROFESSIONAL WORKERS OF AMERICA, C. I. O. AND METROPOLITAN LIFE INSURANCE COMPANY WITH RESPECT TO DISPUTES PENDING BEFORE NATIONAL WAR LABOR BOARD.

1. The parties agree to enter into written collective bargaining agreements with respect to compensation covering all of the agents involved in the various disputes,—the agreements to be as of the date of the Board's order, and to provide for compensation in accordance with the provisions of the order.

2. If the directive order of the Board awards increased compensation, and if it awards such increased compensation retroactively, that is, prior to the effective date of the agreement provided for in paragraph 1, then Metropolitan agrees to deposit under the terms of the attached Escrow Agreement with Leon W. Berney of the United Office and Professional Workers of America, Cecil J. North of the Metropolitan Life Insurance Company, and E. J. Nicholas of the Manufacturers Trust Company, as Escrowees, the amount of such retroactive increased compensation for all of the agents involved in the disputes for the respective periods for which they were involved, that is, from the respective dates as of which retroactive increased compensation was awarded in the several disputes, to the effective date of the agreement provided for in paragraph 1, to be held by the Escrowees pending the final determination of an action to be instituted in a court of competent jurisdiction of the question whether the provisions of Sections 213 and 213-a of the New York State Insurance Law constitute a bar to the payment by the Metropolitan to its agents of retroactive increased compensation.

3. Metropolitan will not question the power of the Board to make the order, nor that it is a final order of the Board, nor will it question the determination of the amount of the compensation involved, but it will question only its ability to make retroactive pay-

ment, in view of the provisions of Sections 213 and 213-a of the New York State Insurance Law.

4. The Union agrees in consideration of Metropolitan's agreements contained in paragraphs 2 and 3, and the attached Escrow Agreement, not to apply to any governmental authority for the enforcement of the Board's order.

5. The Union shall have the initiative to choose the form of action or proceeding and the forum to test the legal question involved; but if the Union shall fail to bring such action or cause such action to be brought within ninety days after the date of the Board's order, the Metropolitan may institute such suit or proceeding.

6. Both parties will abide the final determination by the Courts with respect to the issue submitted to the Court."

Thereafter, in pursuance to the said agreement, Metropolitan deposited with Manufacturers Trust Company, a banking institution in New York City, the sum of $792,318.12 (being the amount due to the agents involved, $1,004,000.00, less taxes required by law to be withheld) to the credit of North, Nicholas and Berney, as escrowees.

Before the making of the agreement of July 19, 1944, and while negotiations for the same were proceeding, the question arose of the proper forum in which to bring the suit. Metropolitan contended that the suit ought to be brought in the courts of the State of New York, since it relied on a statute of that State as a bar to its compliance with the decision of the War Labor Board with respect to the retroactive pay; while the Union contended that the suit ought to be brought in a federal court, since only the federal courts could ultimately decide upon the disposition of the fund, the creation of which was under discussion. By agreement of the parties, this question of the proper forum was submitted to the Superintendent of Insurance of the State of New York. After oral argument and submission of briefs, the Superintendent of

Insurance decided in favor of the contention of the Union, and the provision giving the Union the choice of forum was thereupon inserted in the agreement when it was finally reduced to writing.* Accordingly, this suit was brought by Petitioners at the request of the Union, as representative of the employees involved, in the District Court for the Southern District of New York.

B.

The Issues Raised in the District Court and the Decision of that Court

Petitioners' complaint in the District Court stated the facts substantially as hereinabove set forth, and also alleged, among other things, that the plaintiffs were all citizens of States different from those of which any of the defendants were citizens. Metropolitan interposed an answer in which it made certain denials (which did not raise any issues of fact); set forth in full the provisions of Sections 213 and 213-a of the New York Insurance Law, which, it claimed, constituted a bar to its compliance with the order of the War Labor Board; and prayed, by way of counterclaim, for a judgment declaring that it, Metropolitan, is entitled to the fund, and directing defendant escrowees to pay the same over to it.

At the opening of the trial, after counsel for plaintiffs had made their opening statement, trial counsel for Metropolitan,—who apparently were not familiar with the events leading up to the inclusion of the provisions in the agreement of July 19, 1944, giving the Union the right to select the forum,—stated that the provisions of the New York Insurance Law in question had never been construed by the courts of New York, and invoked an alleged rule of

* See exhibit from brief submitted by the attorneys for UOPWA and letter of Metropolitan printed in papers on Motion for Reargument and for Amendment of the Record, submitted with these papers.

the federal courts to the effect that these courts will refrain from deciding questions of State law in the absence of authoritative State decisions. Counsel for plaintiffs then referred to the fact that the Superintendent of Insurance of the State of New York had passed on this particular question, and that the case was in the United States District Court upon his advice. Thereupon counsel for Metropolitan proceeded with the statement of its case upon the merits and the trial continued without any further reference to this subject by counsel for Metropolitan. There being no substantial questions of fact, the trial consisted of the making of certain formal proof of matters not admitted in the answer, including proof as to the diversity of the citizenship of the parties. The trial then resolved into an argument of the legal questions involved. Plaintiffs' contentions were:

(1) That as a matter of New York law there was nothing in the sections of the Insurance Law invoked by Metropolitan to prevent its compliance with the order of the War Labor Board;

(2) That the provisions of the New York Insurance Law in question, whatever their meaning, were superseded by the order of the War Labor Board made pursuant to the War Labor Disputes Act, and that these provisions of the New York Insurance Law were therefore inoperative as a bar to Metropolitan's compliance with the order of the War Labor Board;

(3) That the provisions of the New York Insurance Law relied upon by Metropolitan would be unconstitutional, if held applicable in the case at bar, because the subject-matter had been pre-empted by a well-integrated system of federal legislation covering labor relations in interstate commerce.

The District Court did not pass upon the question of constitutionality, but sustained the contention of the coun-

sel for the plaintiffs that there was nothing in the New York law to constitute a bar to the plaintiffs' recovery, and that, in any event, the order of the War Labor Board suspended the application of the New York statute to the case at bar. On the question of New York law, the District Court held that because of the agreements of the parties, the retroactive pay involved herein did not constitute a payment *in excess* of the amount agreed upon in the agreement under which the services involved herein were performed (708-727).

C.

Proceedings in and Decisions of Circuit Court of Appeals

Metropolitan being the appellant below, its counsel prepared the transcript of the record of the trial. In so doing, and in conformity with the well-settled practice of the Circuit Court of Appeals for the Second Circuit, which requires that all colloquies of counsel be omitted unless pertinent to a question involved in the appeal, counsel for Metropolitan left out the opening statements,—thus omitting all reference to the alleged federal rule with respect to State decisions invoked by them as hereinbefore stated, and the answer thereto made by counsel for Petitioners. And counsel for Petitioners assuming, as they did at the trial, that counsel for Metropolitan had abandoned their contention with respect to the alleged rule, acquiesced in that procedure. The Transcript of Record in the Court below, therefore, contained no reference either to the point raised by counsel for Metropolitan or to the answer thereto made by counsel for Petitioners. However, in their brief, counsel for Metropolitan,—much to the surprise of counsel for Petitioners,—again invoked the alleged federal rule that the federal courts will not decide a question of State law in the absence of authoritative decision by the State courts. For the reasons

shown further below, counsel for Petitioners did not then deem the matter of sufficient importance to ask for an amendment of the transcript of the record with the consequent delay involved; nor did they, for the same reason, deem it expedient to argue this point at length in their answering brief, in view of the rule of the Circuit Court of Appeals for the Second Circuit which limits briefs to fifty pages, which made such a course possible only at the expense of neglecting what counsel then deemed to be matters of greater importance in the case. In the oral argument in the Court below, counsel for Metropolitan did not refer to this point and counsel for the Petitioners naturally followed suit. *But the Court below made that the point of its decision, and declined to decide the case upon the merits.*

In its opinion, delivered by A. N. Hand, J., the Court below,—contrary, as will be shown further below, to the actual fact,—asserted that the Attorney General of the State of New York, who had filed a brief *amicus curiae,* had taken a position on the New York law contrary to that taken by the District Court, and contended for by counsel for Petitioners. It further assumed, contrary to well-established law, as will be shown further below,—that the decision of the District Court, if affirmed, would expose Metropolitan to the danger of being prosecuted criminally in the State of New York, and penalized in accordance with the penal provisions of the New York Insurance Law. To protect Metropolitan from this alleged danger, the Court below, in reversing the judgment of the District Court, remanded the case to the District Court "* * * with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptness in the New York Supreme Court * * *."

The Court will note that the Circuit Court of Appeals did not say who should bring the suit in the New York Supreme Court, during the pendency of which the District Court was to retain the present suit. There was no direction to Metropolitan to bring such suit, and such a

direction would be contrary to the contractual rights of UOPWA, whom these Petitioners represent, under the agreement of July 19, 1944. Also, as will be shown further below, Petitioners could not bring such a suit without abandoning their present suit,—which would not only be contrary to the same contractual rights of Petitioners and the other employees involved, but would render nugatory the direction of the Court below that the District Court retain this suit pending determining of the new suit to be brought in the State Court, since there would be no way of Petitioners coming back to the District Court in the event of an adverse decision by the State Court.

Because the question upon which the decision of the Court below turned was not treated adequately in the brief of counsel for Petitioners, and was not argued orally by either counsel, Petitioners applied to the Court below for a reargument of the cause so that this point could be argued adequately by their counsel in briefs and orally. And believing that the condition of the Transcript of Record led the Court below into error with respect to the alleged danger threatening Metropolitan of prosecution by the State of New York if the decision of the District Court were affirmed, Petitioners also applied to the Court below for an amendment of the said Transcript of the Record by the inclusion of the statements of counsel in the District Court referred to above. Both of the said applications were denied.

D.

The Position of the Attorney General of the State of New York

As indicated above, the Attorney General of the State of New York filed a brief *amicus curiae* in the Court below. In its opinion, which is annexed to our brief in support of this Petition as Appendix A, the Court below refers repeatedly to the position of the Attorney General which

is stated to be the principal reason for the Court's decision. We shall discuss the brief of the Attorney General in some detail in our brief in support of this Petition, and the same is annexed to our brief as Appendix B. Here, however, we must point out the fact that the Attorney General did not ask the Court below to reverse the judgment of the District Court and *expressly disclaimed any interest in the disposition of the fund which is the subject of this litigation.* In the introductory statement of his brief,—which the Attorney General was required to file under a provision of a New York statute relating to his office,—the Attorney General of the State of New York said:

> "It is neither the purpose nor, we think, the province of the State to interject itself in its capacity of friend of the Court into any dispute as to the agreement of the parties, nor to take any position as to the disposition of the escrow fund which is the immediate subject of the litigation. Neither does the State at the present day feel impelled to deal with the scope of the power of the War Labor Board."

E.

Questions Presented

The questions presented are:

1. Whether the District Court was correct in proceeding to determine the question of New York law; and whether the Circuit Court of Appeals was in error in holding that the District Court should have refrained from deciding this question, in reversing the decision of the District Court, and in directing it to retain the bill pending the determination of proceedings to be brought in the New York Supreme Court. In this connection, we must point out that, as will be shown below, no question of statutory interpretation is involved here since Petitioners do not

contend that as a matter of New York law an insurance company may pay to its agents compensation greater than that fixed by the contract under which their services were performed.

2. Whether as a matter of New York law Petitioners were unable to recover in this suit. In this connection we desire to point out that, as will be shown further below, Petitioners were entitled to recover under New York law even if it should be held that there was no express agreement covering the amount of compensation of the agents here involved at the time of the rendition of their services,—since in that event the services would be rendered under an agreement implied in law whereby Metropolitan was to pay to the agents the reasonable value of their services, which indisputably included the retroactive pay involved herein.

3. Whether the New York statute relied upon by Metropolitan was superseded by the War Labor Disputes Act and the decision of the National War Labor Board thereunder. In this connection we desire to point to the fact that the Attorney General of the State of New York expressly disclaimed any interest in the disposition of the fund involved in this litigation based upon a determination that the War Labor Disputes Act superseded the New York statute relied upon by Metropolitan.

4. Whether the New York statute relied upon by Metropolitan was unconstitutional as an unwarranted attempt by the State of New York to regulate labor relations in interstate commerce. In this connection we desire to point out that the District Court did not decide this point, and that the decision of this question is not necessary to the disposition of the fund involved in this litigation, even if it should be held that Petitioners were not entitled to recover as a matter of New York State law.

F.

Reasons Relied On for the Allowance of the Writ

The questions presented are of the greatest importance in the administration of the federal legal system, and the constitutional rights of citizens to resort to the federal courts on account of diversity of citizenship.

As will be shown further below this case does not involve any problem of statutory construction, but an ordinary problem of State law,—a question of ordinary contract law governed by the rules of the common law which are presumed to be the same in all of the States of the Union. If, therefore, it should be held improper for the federal courts to decide such questions unless there be specific State decisions on the specific questions of contract involved, the constitutional right of citizens to resort to federal courts in questions of diversity of citizenship would be rendered nugatory in most instances.

Furthermore, as will be shown more particularly below, the decision of the Circuit Court is actually incapable of being carried out, since there can be no way for Petitioners to come back to the District Court for the enforcement of their rights in the event of an adverse decision by the New York State courts in the kind of suit envisaged in the decision of the Court below.

All of this is in addition to the grave injustice done by the decision of the Court below to many thousands of workers whose pay for services performed between October 24, 1942 and September 18, 1944, has already been delayed for four years, and would probably be delayed for many years more, unless this Court grants this petition and reverses the judgment of the Court below.

WHEREFORE, your Petitioners respectfully pray that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record upon which its said decisions and orders were made, and that said decisions and orders of the Circuit Court of Appeals may be reversed or modified by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

And your Petitioners will ever pray, etc.

Dated: August 4, 1948.

LOUIS B. BOUDIN,
of Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

PHILIP PARIS, MILES A. ROGERS, HERMAN MEYRICH, JOSEPH H. LEVY, HARRY SCHECHTER and NATHAN ROSENBAUM, suing on behalf of themselves and all others similarly situated who may come in and contribute to the expenses of this suit,

Petitioners,

against

METROPOLITAN LIFE INSURANCE COMPANY, CECIL J. NORTH and E. J. NICHOLAS,

impleaded with

LEON W. BERNEY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions Below

The opinion of the District Court is printed on pages 232-244 of the Transcript of the Record submitted herewith. The opinion of the Circuit Court of Appeals has not yet been officially reported. A copy of the same is annexed hereto and marked Appendix A.

II.

Jurisdiction

Jurisdiction of the District Court was invoked on the ground of diversity of citizenship, and under Judicial Code, Section 24(1), 28 U. S. C., Sec. 41(1); Act of June 14, 1934, 48 Stat. 955, as amended, 28 U. S. C., Sec. 400; National Labor Relations Act, 49 Stat. 449-457, as amended, 29 U. S. C., Secs. 151-166; the joint resolutions of the Congress approved December 8, 1941 and December 11, 1941, respectively (Public Laws 327, 331, 332, 77th Cong., 55 Stat. 795, 796, 797); Executive Order No. 9250 of October 3, 1942; Executive Order No. 9328 of April 8, 1943; War Labor Disputes Act, 57 Stat. 163, 50 U. S. C., Secs. 309, 1501-1511; and all statutes and executive orders amendatory thereof and supplementary thereto.

Petitioners seek a review by certiorari pursuant to Judicial Code, Sec. 240(a), as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, U. S. C. Tit. 28, Sec. 347(a). The dates of the decisions sought to be reviewed are, respectively, as follows:

(1) The original decision of reversal—May 10, 1948.

(2) The denial of motion for reargument—May 28, 1948.

(3) The denial of motion for amplification of the record—May 28, 1948.

III.

Statement of the Case

A full statement of the case has been given under heading A in the *Petition for Writ of Certiorari*, and for brevity the statement is not repeated here.

IV.

Specifications of Error

The Circuit Court of Appeals erred in refusing to consider the case on the merits, in refusing to order a rehearing on the question whether the case ought to be heard on the merits so as to enable counsel for Petitioners to adequately argue this point, and in denying Petitioners' motion to amend the transcript of record so that the same would show the fact that suit was brought in the District Court not only with the consent but upon the decision of the Superintendent of Insurance of the State of New York after the question had been submitted to him by the parties.

V.

Argument

A.

The Decisions Sought to be Reviewed Deprive Petitioners of Their Constitutional and Contractual Rights

The right of Petitioners to resort to the District Court is unquestioned. It is their constitutional right both because of the diversity of citizenship of the parties, and because their right to the fund involved in this litigation arises under the Constitution and laws of the United States. But the right is denied in fact, notwithstanding the direction of the Circuit Court of Appeals that the District Court retain the bill pending a determination of the State law in a suit to be brought in the New York Supreme Court.

As pointed out in the foregoing petition, the Court below did not direct defendant Metropolitan to bring such suit.

Its decision is therefore in effect a direction to Petitioners to bring such a suit in the New York Supreme Court. As will be shown further below, the institution of such a suit by Petitioners would be an abandonment of the present suit, and there would be no way of their exercising their constitutional right to resort to the District Court for the enforcement of their legal rights in the event of an adverse decision by the New York State courts. The decision of the Circuit Court of Appeals therefore clearly deprives Petitioners of their constitutional rights.

In addition, the decision sought to be reviewed deprives Petitioners of their contractual rights. By the agreement of July 19, 1944, Petitioners were expressly given the right to choose the forum in which the question of the right to the fund involved herein was to be litigated. The right to resort to the federal courts was thus specifically accorded to them contractually by the defendant Metropolitan, in consideration of Petitioners' foregoing the right to apply to federal agencies for the enforcement of the order of the War Labor Board. We respectfully submit that Metropolitan was not in a position to raise the question of the forum, even if the point was otherwise well taken; and the Circuit Court of Appeals should not have entertained the point even if there were such a rule as was contended for by counsel for Metropolitan.

It must be borne in mind that no question of jurisdiction is involved in this point. The jurisdiction of the District Court is conceded, and the Circuit Court of Appeals expressly directs the District Court to retain jurisdiction of the case. We may assume for the purpose of this argument that parties may not by agreement require a court to do something which is contrary to its established policy. But no such question is involved herein. In fact, as will be shown further below, the decision of the Circuit Court of Appeals is contrary to the policy announced by this Court in a recent decision.

B.

The Decision Sought to be Reviewed Cannot Possibly be Carried Out

Recognizing the fact that the District Court had jurisdiction of the case, and that Petitioners had a constitutional as well as a statutory right to resort to that Court, the Circuit Court of Appeals directs the District Court to retain the bill pending the decision of the New York State Supreme Court on the question of State law involved herein, in a suit which, in effect, it directs Petitioners to bring in that Court. But the bringing of such a suit by Petitioners would, of necessity, be an abandonment of the present suit; and would make it utterly impossible for Petitioners to ever resort to the District Court for the determination of their rights, whatever the decision of the State Court might be on the question of State law involved.

No suit could, of course, be brought in the New York Supreme Court for the determination of an abstract question of law. The only possible suit would, therefore, be one in which Petitioners would pray the New York State Supreme Court for a judgment declaring their right to the fund involved in the suit herein, and directing the defendants to pay the same over in accordance with the prayer for relief in this suit. Even if such a suit would not otherwise be considered technically an abandonment of the present suit, it would probably be so considered under the agreement of July 19, 1944. Irrespective, however, of the question of the technical abandonment of the present suit, it is clear that an adverse decision by the New York State Supreme Court would be *res adjudicata* on the question of the title to the fund, and that the decision of the New York Supreme Court would be binding upon the District Court, either in this suit, or in any other suit which Petitioners might attempt to institute therein. The bringing of a suit in the New York Supreme

Court in which Petitioners would claim the fund in question purely as a matter of New York State law would, therefore, be clearly fatal to them in the event of an adverse decision by the New York Supreme Court on the question of State law involved.

The only way to escape such fatal consequences would, therefore, be for Petitioners to raise in the State Court suit all of the questions raised in the present suit,—that is to say, not only the question of New York State law, but also the federal questions involved in this suit. It is only by raising the federal questions in the State Court that Petitioners could secure ultimate review by this Court of the federal questions involved in this dispute. The direction of the Circuit Court of Appeals that Petitioners bring a suit in the New York Supreme Court for the determination of the question of State law involved could not, therefore, be carried out in the manner contemplated by the Circuit Court of Appeals. It amounts, in effect, to a direction that all of the questions involved in this suit be litigated in the State Courts, with a possible appeal to this Court in case of an adverse decision by the State Courts. Clearly, therefore, there is no possible way in which the matter could again come into the District Court. Hence the Circuit Court's direction to Petitioners to bring a suit in the New York Supreme Court and its direction to the District Court to retain the bill pending such suit are clearly contradictory as the former renders the latter nugatory. Whatever the outcome of the suit which Petitioners are directed by the Circuit Court of Appeals to bring in the New York Supreme Court, there is neither any necessity nor any possibility of the matter ever coming again in the District Court. If a suit is brought by Petitioners in the New York Supreme Court,—or by Metropolitan, for that matter,—it will be the judgment of the State Courts that will ultimately decide the disposition of the fund involved in this suit. And that irrespective of the nature of the decision of the State Courts either on the question of State law involved, or on the questions

of federal law. Should the State Courts decide the question of State law in favor of Petitioners, the case would never reach any federal court. In any other contingency the only federal court that such a suit could possibly reach would be this Court; and in such event it would still be the judgment of the State Court that would ultimately dispose of the fund involved in the suit herein, under a mandate from this Court to enter judgment in accordance with its directions.

C.

The Asserted Danger to Metropolitan is Wholly Imaginary

The reason given by the Circuit Court of Appeals for its determination not to decide this case upon the merits is the supposed danger to Metropolitan, in the event of affirmance of the decision of the District Court, of a prosecution by the New York State authorities under the criminal provisions of the New York State Insurance Law. Such a prosecution is not only wholly imaginary under the facts of this case, but utterly impossible under our constitutional system.

It is clear that the danger of a prosecution of Metropolitan by the New York State Superintendent of Insurance for its having done something that he had expressly advised it to do is not only remote but wholly imaginary. But quite aside from the wholly imaginary character of such an attempt, it is clear that such an attempt could not possibly succeed. Under the Constitution of the United States that Constitution and the laws made in pursuance thereof are the supreme law of the land. Under the judicial system established under that Constitution this Court may review decisions of the State Courts involving questions arising under the Constitution or laws of the United States; and all federal courts may decide questions of

State law in suits brought in the federal courts in cases of diversity of citizenship. It would therefore be not only a novelty but a revolution in our entire constitutional system if a State Court could fine or imprison anyone for having complied with a decision of a federal court. It is therefore needless to discuss the question whether under the decision of the District Court, Metropolitan is required to *do* anything beyond what it has already done in depositing the fund with Manufacturers Trust Company.

D.

The Injustice to the Workers Involved is Real

While the danger to Metropolitan is wholly imaginary, the injustice done to the workers involved by the decision of the Circuit Court of Appeals is real. The services rendered by them to Metropolitan were performed between October 24, 1942 and September 18, 1944. Four years have therefore passed since the last of the services were performed, but their remuneration still remains unpaid. By the decision of the Circuit Court of Appeals they are directed to enter upon a new litigation which in all probability will take another three years at least. This Court may take judicial notice of the judicial structure of the New York State courts; and may also take judicial notice of the fact that a corporation like Metropolitan does not give up until every possible legal angle has been explored and every legal trick exhausted. It is a matter of judicial record that, although this Court had decided as far back as April 12, 1937 that the National Labor Relations Act was not contrary to "due process", and that the Act applied to "white collar workers", and the New York State Labor Relations Act was modelled upon the national Act, Metropolitan raised the same points again in an attack upon the constitutionality of the State Labor Relations Act, which dragged on through the various courts

for several years until a decision was rendered by the New York Court of Appeals. And it is a matter of record *in this case* that although Metropolitan solemnly agreed on July 19, 1944 for a good consideration, that this suit might be brought in the federal courts, the workers are still without their pay because Metropolitan has advanced the argument that the workers had no right to resort to the federal courts. We respectfully submit that the pay of the workers ought not to be further delayed except for the most urgent reasons of public policy. And, we respectfully submit further, there are no reasons whatever for such delay.

E.

This Suit Does Not Involve Any Statutory Construction

The opinion of the Circuit Court of Appeals assumes that the question of State law involved in this case is one of the constructions of the New York State statute invoked by Metropolitan. But such is not the actual case. As already stated, we concede that as a matter of New York State law Metropolitan may not voluntarily pay to the agents involved in this suit, either by separate agreements with the individual agents or by collective bargaining agreement with the union representing them, any remuneration greater than that provided for by the agreement under which their services were performed. But no such situation is involved in this case. There was no voluntary agreement,—except to submit the question of pay to the War Labor Board. Nor is there any payment greater than that provided for in any agreement under which their services were performed. We take it that it will not be contended that under the New York statute invoked by Metropolitan an insurance company may not submit to arbitration a dispute between itself and its employees with respect to their remuneration; or that Metropolitan

would be bound by the decision of the person or board to whom the question is submitted, provided the remuneration awarded did not exceed the maximum provided by the statute. Concededly, the remuneration awarded retroactively by the War Labor Board does not exceed the maximum provided by the New York Insurance Law. No question of statutory construction therefore arises in the case. Indeed, no such question would arise even if Metropolitan were now to contend that the New York Insurance Law does prohibit Metropolitan from submitting the question of the pay of its agents for decision to any person or board. For, as will be seen further below, the right of petitioners to recover does not depend upon the existence of a valid agreement by Metropolitan to submit the question of the amount of the pay of its agents to any person or board for decision.

F.

The Questions of State Law Involved in This Suit are Questions of Contract Law and are Entirely Free from Doubt

Having assumed that this case involves a dispute over the construction of a section of the New York State Insurance Law, the Court below, in the decision sought to be reviewed, declined to decide any question because of the lack of authoritative interpretation by the courts of the State of New York. As already pointed out, there is no dispute between the parties to this litigation over the construction of the New York statute referred to; and the dispute is wholly within the domain of contract law. We now proceed to show that the questions of contract law, far from being doubtful, are simple and entirely free from doubt under the ordinary rules governing the law of contracts. And by way of preliminary we may point out that the New York Court of Appeals has repeatedly held that

the common law of New York is presumed to be the same as that of the common law of all other States.

Southworth v. *Morgan*, 205 N. Y. 293;
Fisher v. *Fisher*, 250 N. Y. 313;
Weissman v. *Banque de Bruxelles*, 254 N. Y. 488;
Cherwien v. *Geiter*, 272 N. Y. 165.

As the Court will see from our brief in the Circuit Court of Appeals, our contention as to the New York law was that the retroactive pay awarded by the War Labor Board, far from being *greater than* was actually *in conformity with* the contract under which the services of the agents involved were performed. This contention was based, in the first place, on the collective bargaining agreements between Metropolitan and the unions involved, which specifically left the question of the amount of the pay of these employees to the decision of the War Labor Board. It was and is our contention that those agreements themselves were, as a matter of contract law,—in view of the well-known practice of the War Labor Board, of which both parties were aware,—retroactive to the dates when the several disputes arose. Such was the decision of the District Court. And the correctness of this decision does not depend upon the construction of the statute involved to be gleaned from any decision of the New York State courts construing this statute, but rather on the ordinary rules of common law, to be gleaned from the general body of the decisions of those courts with respect to the construction of contracts. And in the absence of such decisions the meaning of these contracts may be gleaned from the general body of common law as laid down by the courts of other States or the federal courts construing the laws of other States.

But while reliance was had in the first instance on the express agreement of the parties, the right of the plaintiffs to recover, as a matter of New York State law, did not by any means depend upon the existence of such express

contract. For in the absence of such contract the workers involved herein were entitled to recover as a matter of New York law on a *quantum meruit;* and as was pointed out in our brief in the Circuit Court of Appeals that is exactly what they got under the decision of the War Labor Board, both as a matter of law and under contract between the parties. Whether our contention in this respect was correct is immaterial here. What *is* material is the fact that this point does not involve any question of statutory construction, but the question of contract law, which it was the duty of the Court below to examine and decide. There is no suggestion that there is any dearth of authoritative decisions on this point. Indeed, there could not be. This Court has held that when a dispute arises between an employer and the duly certified collective bargaining agent of its employees, the then existing agreements, whatever their character, terminate; and that pending the dispute the employer has no right to enter into any individual agreements with the employees involved.

J. I. Case Co. v. *NLRB,* 321 U. S. 332;
Medo Photo Supply Corp. v. *NLRB,* 321 U. S. 678.

And the New York law is well settled that where services are rendered without an express agreement the law implies an agreement that the employer will pay and the employee accept the reasonable value of the services. This is well-settled law of New York; and the Circuit Court of Appeals of the Second Circuit had no difficulty in finding this law, and in disposing of a case in accordance therewith. In *Martin* v. *Campanaro* (156 F. (2) 127), a case which is on all fours with the case at bar, the Circuit Court of Appeals held that, where a dispute arose between an employer and the collective bargaining agent of its employees during the late war, and the employees continued to perform their services, it would *not* be presumed that they continued to work under the previous agreement, but that the law will, in such a case, presume a contract implied in fact

whereby the employees were to be paid on a *quantum meruit*. In the course of its decision in that case the Circuit Court of Appeals said:

> "When an agreement expires by its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provisions as the old. Ordinarily, the existence of such a new contract is determined by the 'objective' test, i. e., whether a reasonable man would think the parties intended to make such a new binding agreement—whether they acted as if they so intended.
>
> Applying that test, as it is applied by the New York (as well as most other) courts no new contract to continue on the old terms came into being here. In the light of the notice of April 19, 1944, from Amalgamated to Suburban, the subsequent unsuccessful negotiations, the activities of the Mediation Board, the hearings before the National War Labor Board, and the wartime no-strike pledge given by organized labor (of which we may take judicial notice), we think that a 'reasonable man' would not believe that, when these employees continued to work, while their representative, Amalgamated, were making efforts to procure revised terms, they were agreeing to work, in the interval, at the old rates. • • •
>
> We think that here there was a contract 'implied in fact' to pay the reasonable value of the services unless a new contract definitizing the wage-rates should be negotiated, and that, in the meantime, the employees accepted, merely on account, what was paid them."

Martin v. *Campanaro*, 156 F. (2d) 127, 129-130.

Obviously the law of New York on this point seemed quite clear to the Court below when it was deciding *Martin* v. *Campanaro*. It is still clear to anyone who takes the trouble to look into the subject. And the only reason the Court below failed to see it in the present case was because it proceeded on the erroneous notion that the question of State law involved was one of the construction

of the sections of the Insurance Law invoked by Metropolitan, instead of the questions of contract law urged upon it by counsel for Petitioners.

G.

The Court Below Misapprehended the Position of the Attorney General of the State of New York

In its opinion the Court below says:

> "If we should hold the payments permitted under a proper interpretation of the State Insurance Law we would not bind the State which is not a party to the present suit but has filed a brief by its Attorney General as *amicus curiae* arguing that the New York Insurance Law prohibits the retroactive payments."

The last statement is contrary to the entire tenor of the Attorney General's brief, and to his express disclaimer of any interest in the fund here in litigation which represents the retroactive pay ordered by the War Labor Board. We have quoted that specific disclaimer in the foregoing petition, and need not repeat it here. Nothing could be more emphatic than that disclaimer, and nowhere in his brief does the Attorney General argue that the retroactive pay represented by the fund here in litigation is prohibited by the Insurance Law of the State of New York.

The reason for the Attorney General's disinterestedness in the outcome of the present litigation is obvious, and was stated clearly by the Attorney General himself in the introduction to his brief from which we have quoted,—namely, that, in so far as the suit turned on New York law, it involved an ordinary question of contract between Metropolitan and its employees as represented by their collective bargaining agents. The decision of the Court below, therefore, not only did not "bind" the State of New

York to anything, but did not involve any interpretation of its Insurance Law which might either guide or embarrass the New York Superintendent of Insurance in the administration of his office.

The complete lack of interest of the State of New York in the present litigation was shown, in the first instance, by the failure of the Superintendent of Insurance to intervene in the suit, of the existence of which he was fully aware. And it was shown again by the nature of the brief which the New York Attorney General filed in the Court below. As already pointed out, *the Attorney General did not ask the Court below to reverse the judgment of the District Court.* The only reason for his filing the brief *amicus curiae,* as explained by himself, was that the question of the constitutionality of the New York statute had been raised in the case. That question having been raised, it was his duty as the chief legal officer of the State of New York to defend the constitutionality of the statute. And having decided to file a brief, it was natural for him to take cognizance of the arguments made by the contending parties and the construction placed by them upon the decision of the District Court.

It so happens that counsel for Metropolitan have completely misconceived that decision, as well as the contentions of counsel for Petitioners; and they have therefore completely misrepresented both of them in the brief filed by them in the Court below. In their brief, counsel for Metropolitan insisted, first, that counsel for Petitioners contended that the provisions of the New York State Insurance Law in question did not apply to collective bargaining agreements, and, second, that the District Court had decided that an insurance company may pay to its agents remuneration in excess of that fixed by the agreement under which the services were performed provided that such additional payments were not unreasonable. No such contention was made by counsel for Petitioners, and no such decision was made by the District Court. But the Attorney General naturally considered it prudent to

inform the Court below that the New York State Insurance Law permitted no exceptions in favor of collective bargaining agents, and that the *voluntary* payment of compensation *in excess of that fixed by the agreement under which the services were performed* is absolutely prohibited, and is not dependent upon the reasonableness of the additional payment involved.

That is *all* that the Attorney General of the State of New York found it necessary to say in his brief with respect to the meaning of the New York Statute as he understood it. That the Attorney General did not think that his interpretation prevented Petitioners from recovering in this suit is self-evident from the fact that he did not ask the court below to reverse the judgment of the District Court and expressly disclaimed any interest in the outcome of the present litigation.

But the Attorney General did not stop at that. Instead, he proceeded to show his lack of interest in the Petitioners' claim that they are entitled to recover, in any event, as a matter of federal law because of the supersedure of the New York State Law by the order of the War Labor Board made under the War Labor Disputes Act. In this connection, it must be borne in mind that while the District Court did not reach the question of the constitutionality of the provisions of the New York statute invoked by Metropolitan, it *did* reach the question of the supersession of that statute by the War Labor Disputes Act and the order of the War Labor Board made thereunder, and *did* hold that the federal statute and order suspended the operation of the New York statute, and rendered it *inoperative* in so far as the present suit was concerned. The complete silence of the New York Attorney General in his brief on this point, and his failure to ask the Court below to reverse the judgment of the District Court clearly demonstrates that the State of New York has manifested a complete disinterestedness as to both grounds upon which the decision of the District Court was based.

Clearly, also, there is nothing in the attitude of the State of New York which requires the federal court to wait upon any decision of the Courts of New York with respect to the meaning of its Insurance Law. As already stated, the Superintendent of Insurance expressly advised the parties before the suit was brought that this litigation belongs in the federal courts. When the suit was brought, he did not deem it necessary to intervene, since the State of New York had no special interest in this private suit between Metropolitan and its employees. And when he was finally called upon to file a brief because of the constitutional question raised, far from asking the Court to halt the ordinary course of the suit, or to suggest that any part ought to be litigated in the Courts of the State of New York, he expressly disclaimed any interest in the disposition of the fund in litigation.

II.

The Court Below Completely Misapprehended the Position of This Court on the Important Question of Federal Relations

In its opinion, the Circuit Court of Appeals cited four decisions of this Court which, it claimed, dictated the disposition which it made in the decision sought to be reviewed. Even the most cursory examination of those cases will demonstrate that the Court below misapprehended the purport of those decisions. And an examination of other pertinent decisions of this Court, particularly the case of *Meredith* v. *Winter Haven*, 320 U. S. 228, will clearly demonstrate that under the policy laid down by this Court for the guidance of the lower federal courts, both the District Court and the Circuit Court of Appeals were required to decide this case upon the merits in all of its phases. The cases cited by the Circuit Court of Appeals are: *Pullman Co.* v. *Railroad Commission of Texas*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168;

Spector Motor Co. v. McLaughlin, 323 U. S. 101; *A. F. of L. v. Watson*, 327 U. S. 582. Without going into an exhaustive examination of those cases, it is sufficient to point out here that—

(a) In none of the cases relied upon was there a fund before the Court requiring disposition; nor was there any claim by any of the plaintiffs of a present right to recover money, or other property, the enjoyment of which would be delayed by remission of the parties to the state courts for preliminary adjudication of the state law involved.

(b) In each of the cases cited an important state agency was the defendant, and the judgment sought was an injunction enjoining that agency from the performance of some of its functions, or a decree *shaping its course* in the performance of those functions. Needless to say, in each case the state agency resisted the judgment or decree sought by the plaintiff.

(c) Each of the cases cited was an equity suit in which appeal was made to the extraordinary power of an equity court by way of injunction—none involving simple litigation by private parties, basically of a common law character, such as is involved in this case, in which the basic right of the plaintiffs is one to recover for work, labor and services.

(d) In each of the cited cases the plaintiff could apply to the state courts without giving up any rights. In two of the cases there were actually suits pending in the state courts. In one of these some of the plaintiffs in the federal action were actually parties to the suits pending in the state courts; and in the other case the party plaintiff in the state court was the parent corporation of the plaintiff in the federal suit.

(e) Each of the cases cited involved an important governmental function of the state,—the shaping of which by the federal court was sought by the bill of complaint.

The *Pullman* case involved the burning social issue of race relations between whites and negroes in the South. The *Fieldcrest* case was concerned with the functions of the Health Department of the City of Chicago in the preservation of the health of that great community. The *Spector Motor Co.* case involved the taxing power of the State. The *A. F. of L.* case involved the entire problem of labor relations, and unionization, and particularly the so-called "closed shop" issue, which has become, next to the race question, one of the great "social issues" in the South, with repercussions elsewhere throughout the country.

The extraordinary character of those cases can be judged from the fact that in two of the four cases a three-judge court was convened under special statute, providing for appeal directly to the Supreme Court; and in one of the other two cases, the tax case, there was a serious question whether the case was not barred from the federal courts by the *Johnson Act*, which was specifically passed by Congress after long agitation, in order to prevent the federal courts from interfering with this particularly important function of state government. The last of the four cases, the *Fieldcrest* case, involved, as already stated, the health of the people of the second largest city in the Union—the protection of the health of its citizens being, next to the taxing power and the preservation of peace, the most important function of the state governments. It is part of the "police power" in the narrowest and most technical sense of that term. Clearly, policies controlling such cases cannot possibly be made applicable to private litigation between employer and employees for the laborers' hire, which should neither be denied nor delayed, except for the gravest and most compelling reasons.

It is, of course, unnecessary on this application to discuss all of the cases bearing on this subject which clearly demonstrate that the Circuit Court of Appeals has misapprehended the true policy of federal relations involved herein as laid down by this Court. Some of those cases

are discussed in our brief in the court below which is submitted herewith; although even there the matter is not discussed adequately for the reasons indicated in the foregoing petition. We believe it will be sufficient for the purpose here in hand to discuss briefly the decision of this Court in the case of *Meredith* v. *Winter Haven* already referred to. That was a diversity case involving two questions of state constitutional law, one of which had never been passed upon by the state courts, and as to the other of which the state court decisions were in confusion. The District Court dismissed the bill on the merits, and the Circuit Court of Appeals reversed and directed a dismissal without prejudice—being of the opinion that the parties should be remitted to a suit in the state court where the state law would be established. This Court reversed and directed the Circuit Court of Appeals to examine and decide the case on the merits, saying:

> "We are of opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.
>
> The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment (citing cases). When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain

or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."

Meredith v. *Winter Haven*, 320 U. S. 228, 234-235.

We respectfully submit that this is an eminently proper case for this Court to issue a *writ of certiorari* to the Circuit Court of Appeals, and to remove the cause to this Court for such disposition as the merits of the case require. No questions of fact are involved upon which a decision of the Circuit Court of Appeals might be required or proper; and the nature of some of the legal questions is such as to require an ultimate determination by this Court. The interests of justice to the workers involved, and the convenience of all concerned will therefore be subserved by a decision of this Court upon the merits without further reference to the Circuit Court of Appeals, in accordance with the policy initiated by this Court in former decisions.

Lamar v. *United States*, 241 U. S. 103.
Cole v. *Ralph*, 252 U. S. 286.
Ecker v. *Western Pacific*, 318 U. S. 448, 489.
Story Parchment Co. v. *Paterson*, 282 U. S. 555, 567.

Dated, New York, August 2, 1948.

Respectfully submitted,

Louis B. Boudin,
Of Counsel for Petitioners,
1776 Broadway,
New York City.

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS

For the Second Circuit

No. 215—October Term, 1947.

(Argued April 6, 1948 Decided May 10, 1948.)

Docket No. 20922

Philip Paris, Miles A. Rogers, Herman Meyrich, Joseph H. Levy, Harry Schechter and Nathan Rosenbaum, suing on behalf of themselves and all others similarly situated who may come in and contribute to the expenses of this suit,

Plaintiffs-Appellees,

against

Metropolitan Life Insurance Company, Cecil J. North and E. J. Nicholas,

Defendants-Appellants,

and

Leon W. Berney,

Defendant.

Before:

L. Hand, Augustus N. Hand and Chase,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

From a declaratory judgment awarding to the plaintiffs and those on whose behalf they are suing a certain fund amounting to $792,318.12 deposited by the defendant Metropolitan Life Insurance Company (which we shall hereafter call Metropolitan) with the Manufacturers Trust Company to the credit of the defendants Cecil J. North, E. J. Nicholas and Leon W. Berney, as escrowees, Metropolitan, Cecil J. North and E. J. Nicholas appeal. Reversed.

PROSKAUER, ROSE, GOETZ & MENDELSOHN, *Attorneys for Defendants-Appellants;* Burton A. Zorn, Eugene Eisenmann, Phillip W. Haberman, Jr., and Howard Lichtenstein, Counsel.

BOUDIN, COHN & GLICKSTEIN, *Attorneys for Plaintiffs-Appellees;* Louis B. Boudin, Murray I. Gurfein, Sidney E. Cohn and Daniel W. Meyer, Counsel.

NATHANIEL L. GOLDSTEIN, Attorney General of the State of New York, and *Attorney for Robert E. Dineen,* Superintendent of Insurance of the State of New York, *Amicus Curiae.*

AUGUSTUS N. HAND, *Circuit Judge:*

The plaintiffs are individual insurance agents employed by the defendant Metropolitan, a New York corporation. These agents are suing in their own behalf and for other agents similarly situated to obtain a declaratory judgment awarding to them a fund of $792,318.12 deposited by Metro-

politan in Manufacturers Trust Company to the credit of the defendants North, Nicholas and Berney as escrowees. The plaintiffs were chosen by two agents' unions to represent a large number of individual claimants. They seek to obtain an award of the fund under a so-called directive order of the War Labor Board which granted an increased rate of pay and attempted to make it retroactive to the dates of certification to that Board by the Secretary of Labor of various disputes between Metropolitan and the bargaining agents.

The insurance agents were employed by Metropolitan in New York, New Jersey, Pennsylvania, Michigan, Massachusetts, Connecticut, and Illinois, were engaged in soliciting both life and industrial insurance, and had selected the United Office and Professional Workers of America with its affiliated local unions as their agents to secure for them higher compensation and other advantages. Conciliation efforts to settle disputes with Metropolitan in these States having failed, the cases were certified to the National War Labor Board by the Secretary of Labor, and were ultimately consolidated by order of the Board. During the proceedings before the Board, the question of retroactive pay arose, and Metropolitan took the position that it would be unable to comply with any decision of the Board which might award retroactive increased pay, because of the provisions of Sections 213 (7) and 213-a (5) of the New York Insurance Law. On July 19, 1944, while the case was pending before the Board and in anticipation of a decision granting retroactive pay, the Union and Metropolitan entered into a stipulation which is set forth in the margin.[1]

[1] STIPULATION BETWEEN UNITED OFFICE AND PROFESSIONAL WORKERS OF AMERICA, C.I.O. and METROPOLITAN LIFE INSURANCE COMPANY WITH RESPECT TO DISPUTES PENDING BEFORE NATIONAL WAR LABOR BOARD.

1. The parties agree to enter into written collective bargaining agreements with respect to compensation covering all of the agents

In general it provided that Metropolitan would deposit in escrow whatever amount of money might be ordered by the Board as retroactive pay in these disputes subject to a determination by a court of competent jurisdiction of the controversy with respect to Metropolitan's ability to pay such an award in view of the provisions of the New York

---

involved in the various disputes,—the agreements to be as of the date of the Board's order, and to provide for compensation in accordance with the provisions of the order.

2. If the directive order of the Board awards increased compensation, and if it awards such increased compensation retroactively, that is, prior to the effective date of the agreement provided for in paragraph 1, then Metropolitan agrees to deposit under the terms of the attached Escrow Agreement with Leon W. Berney of the United Office and Professional Workers of America, Cecil J. North of the Metropolitan Life Insurance Company and E. J. Nicholas of the Manufacturers Trust Company, as Escrowees, the amount of such retroactive increased compensation for all of the agents involved in the disputes for the respective periods for which they were involved, that is, from the respective dates as of which retroactive increased compensation was awarded in the several disputes, to the effective date of the agreement provided for in paragraph 1, to be held by the Escrowees pending the final determination of an action to be instituted in a court of competent jurisdiction of the question whether the provisions of Sections 213 and 213-a of the New York State Insurance Law constitute a bar to the payment by the Metropolitan to its agents of retroactive increased compensation.

3. Metropolitan will not question the power of the Board to make the order, nor that it is a final order of the Board, nor will it question the determination of the amount of the compensation involved, but it will question only its ability to make retroactive payment, in view of the provisions of Sections 213 and 213-a of the New York State Insurance Law.

4. The Union agrees in consideration of Metropolitan's agreements contained in paragraphs 2 and 3, and the attached Escrow Agreement, not to apply to any governmental authority for the enforcement of the Board's order.

5. The Union shall have the initiative to choose the form of action or proceeding and the forum to test the legal question involved; but if the Union shall fail to bring such action or cause such action to be brought within ninety days after the date of the Board's order, the Metropolitan may institute such suit or proceeding.

6. Both parties will abide the final determination by the Courts with respect to the issue submitted to the Court.

Insurance Law. The Union agreed not to apply to any governmental authority for enforcement of the Board's order. On September 18, 1944, the War Labor Board made a decision awarding increased pay in the sum of $2.85 per week, retroactive to the date of certifications of the disputes to the Board, and the necessary amount was deposited in escrow by Metropolitan.

In the case at bar the District Court held that Sections 213 (7) and 213-a (5) of the State Insurance Law did not forbid the retroactive payments ordered by the War Labor Board, and that even if those provisions be interpreted as prohibiting these payments ordered by the Board under the federal War Labor Disputes Act its order superseded the State enactments and rendered them inoperative. Accordingly a decree for plaintiffs was directed by the District Court.

In the circumstances disclosed we are not disposed to discuss either the issue of the proper interpretation of the State Act or the merits of the somewhat delicate questions of possible conflict between United States and State laws which might be involved in the litigation. There is not only the disputed question as to the scope of Sections 213 (7) and 213-a (5) of the State Insurance Law,[2] but there

---

[2] Section 213(7) relating to ordinary life insurance provides:

> No such company, and no person, firm or corporation on its behalf or under any agreement with it, shall pay or allow to any agent, broker or other person, firm or corporation for procuring an application for a life insurance policy, for collecting any premium thereon or for any other service performed in connection therewith any compensation greater than that which has been determined by agreement made in advance of the payment of the premium, except that, if supervision over any outstanding life insurance by a local salaried representative of such company is discontinued, a premium collection or policy service fee may thereafter be paid on renewal premiums not exceeding two per cent of the renewal premiums actually collected on such insurance.

Section 213-a(5) relating to industrial life insurance provides:

> No such company, and no person, firm or corporation, on its behalf or under any agreement with it, shall pay or allow to

is the further issue whether, if these sections be interpreted as prohibiting the retroactive payments, they would transgress the order of the War Labor Board claimed by the plaintiffs to be controlling as made in the exercise of the war powers of the federal government or alternately federal powers exercised under the National Labor Relations Act.

If we should hold the payments permitted under a proper interpretation of the State Insurance Law we would not bind the State which is not a party to the present suit but has filed a brief by its Attorney General as *amicus curiae* arguing that the New York Insurance Law prohibits the retroactive payments. Thus if we held these payments valid we would leave Metropolitan subject to criminal penalties which the State might impose under Section 5 of that law[3] for violation of its provisions, if the State Court did not accept our views. On the other hand, if we should hold the payments forbidden by the terms of the State Act, it would then be necessary to determine the validity of those provisions within the respective areas of federal and state powers existing under the Constitution.

If we should pass upon the question of statutory construction now, in the absence of any authoritative interpretation by the State, our decision might embarrass the

---

any agent, broker, employee or other person, for services in procuring an application for industrial life insurance, for collecting any premium thereon or for any other service performed in connection therewith, any compensation greater than that which has been determined by agreement made in advance of the rendering of such service.

[3] §5. Penalties

Every violation of any provision of this chapter shall, unless the same constitutes a felony, be a misdemeanor. Every penalty imposed by this section shall be in addition to any penalty or forfeiture otherwise provided by law.

State authorities in exercising important functions in regulating insurance. On the other hand, a decision by the State Court as to the meaning of the statute will be binding upon the parties and may obviate any necessity of determining constitutional questions which are present. In view of the above considerations the judgment of the District Court awarding the fund deposited in the Manufacturers Trust Company to the plaintiffs should be reversed and the cause remanded to that court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptness in the New York Supreme Court in conformity with this opinion.

This appeal should receive the above disposition under the doctrine enunciated by the Supreme Court in *Railroad Commission* v. *Texas*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101; *A. F. of L.* v. *Watson*, 327 U. S. 582. The situation disclosed in the case at bar is one where the State Court should be allowed to construe its own law because only its decision can be regarded as definitively authoritative and also because such a determination by the State Court might render it unnecessary to pass upon the constitutional question we have discussed. These were reasons given in the decisions in the Supreme Court in the above cases. We do not violate the admonition in *Meredith* v. *Winter Haven*, 320 U. S. 228, 234, that "the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision." We think the absence of the State as a party here does not render the above authority inapplicable since there exists not only the risk which Metropolitan would undergo of criminal prosecution but the contention of the Attorney General in his brief as *amicus*

curiae that the payments to plaintiffs are forbidden by the terms of the New York Insurance Law.

The judgment is reversed and the case is remanded to the District Court with directions to proceed in accordance with the views set forth in this opinion.

APPENDIX B

United States Circuit Court of Appeals

For the Second Circuit

PHILIP PARIS, MILES A. ROGERS, HERMAN MEYRICH, JOSEPH H. LEVY, HARRY SCHECHTER and NATHAN ROSENBAUM, suing on behalf of themselves and all others similarly situated who may come in and contribute to the expenses of this suit,

Plaintiffs-Appellees,

against

METROPOLITAN LIFE INSURANCE COMPANY, CECIL J. NORTH and E. J. NICHOLAS,

Defendants-Appellants,

and

LEON W. BERNEY,

Defendant.

BRIEF OF STATE OF NEW YORK AS AMICUS CURIAE

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York, and
Attorney for Robert E. Dineen, Superintendent of Insurance of the State of New York.

INDEX

Table of Cases Cited

United States Circuit Court of Appeals

For the Second Circuit

PHILIP PARIS, MILES A. ROGERS, HERMAN MEYRICH, JOSEPH H. LEVY, HARRY SCHECHTER and NATHAN ROSENBAUM, suing on behalf of themselves and all others similarly situated who may come in and contribute to the expenses of this suit,

Plaintiffs-Appellees,

against

METROPOLITAN LIFE INSURANCE COMPANY, CECIL J. NORTH and E. J. NICHOLAS,

Defendants-Appellants,

and

LEON W. BERNEY,

Defendants.

BRIEF OF STATE OF NEW YORK AS AMICUS CURIAE

STATEMENT

The State of New York by its Attorney General respectfully begs leave to submit this brief as *amicus curiae* on the above entitled appeal.

The case brings in question not only the construction but the constitutionality in relation to Federal power

over interstate commerce of two provisions of the New York Insurance Law (Section 213, subd. 7; Section 213-a, subd. 5). As the State's chief legal officer, the Attorney General is charged with duties in defense of the constitutionality of State enactments (Executive Law, § 68). In addition, he represents the Superintendent of Insurance (Executive Law, § 62), who is the administrative head of the New York State Insurance Department, and is charged with the powers and duties relating to the business of insurance contained in the Insurance Law (§ 10).

THE ISSUES AND THE INTEREST OF THE STATE

The facts giving rise to the differences between the parties and the inception of the litigation leading to this appeal have been fully treated in their respective briefs. Some issue appears to persist between the parties as to the precise question or questions reserved for judicial determination by their stipulation of July 19, 1944 (Transcript, pp. 41, 42). That issue concerns whether the question to be submitted was the construction of the State statutes or also included whether the order of the War Labor Board could require payment of compensation to agents in excess of that fixed in advance despite State statutory insurance regulations to the contrary.

It is neither the purpose nor, we think, the province of the State to interject itself in its capacity of friend of the Court into any dispute as to the agreement of the parties, nor to take any position as to the disposition of the escrow fund which is the immediate subject of the litigation. Neither does the State at the present day feel impelled to deal with the scope of the power of the War Labor Board.

The construction of the State statutes is in issue in any view and was passed on by the Court below quite independently of its further holding that the War Labor Board order rendered the State law inoperative even if otherwise applicable. The District Court held initially that the intended operation of the Insurance Law provisions was only to prohibit retroactive payment of additional compensation to agents which was "excessive, unreasonable and discriminatory" (p. 237). That holding leaves open on this appeal the question whether an absolute prohibition, in terms, against payments to agents in excess of compensation fixed in advance can be construed as subject to an unexpressed exception requiring administrative or judicial application of a variable standard to the varying facts of every individual case.

The District Court mentioned the decision in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, holding insurance conducted across State lines to be interstate commerce in connection with the expression of its views regarding the War Labor Board's powers. It also referred to Public Law 15 (the McCarran Act, 15 U. S. C. A. 1011, *et seq.*), which was impelled by that decision, holding that the Act did not restrict the authority of the War Labor Board under the war power. In this there appears no intimation that, because the commerce power of Congress extends to the insurance business, the State is without power to make the statutory regulations here involved. There emerges in the issues joined before this Court, however, a contention on the part of the appellees that, despite Public Law 15, the New York Insurance Law provisions involved are rendered invalid by the mere possession of national power to regulate insurance as interstate commerce.

These two issues, of construction and of constitutionality, presently and prospectively affect both the extent of the duty imposed upon the New York Superintendent of Insurance and his power to execute the regulations of the State for the proper conduct of the insurance business in the public interest. It is for those reasons and upon those issues that the State asks leave to express its views for the assistance of the Court.

POINT I

Sections 213(7) and 213-a(5) of the New York Insurance Law are intended to impose a prohibition against payments to agents in excess of compensation agreed upon in advance of the rendition of the services.

The present prohibition in the above named sections of the New York Insurance Law is directly derived from former Section 97, added in 1906 in response to the recommendation of the Legislative Committee, appointed under joint resolution and known as the Armstrong Committee. That committee was specifically directed to examine into all phases of the business of life insurance companies doing business in New York "for the purpose of drafting and reporting to the next session of the Legislature such a revision of the laws regulating and relating to life insurance in this State as said Committee may deem proper" (see Legislative Insurance Investigating Committee, Vol. VII, Report of the Committee, p. 7). Its recommendation as to the enactment of such a provision as is here involved appeared under the heading "Expenses," and was that:

> "All commissions should be definitely agreed upon in advance and should be a fixed percentage of the premium for each $1,000 of insurance." (Report, pp. 304, 306.)

Both Section 213, relating to life insurance, derived from former Section 97 and renumbered in the revision of 1939, and Section 213-a, as added in 1940, expressly governing industrial life insurance, are headed "Limitation of Expenses," and in addition to the particular subdivisions concerned contain other restrictions on the compensation of agents, including fixed maximum percentages.

The language of both provisions is unequivocal. It imposes a requirement that compensation to agents be determined by agreement in advance as a basis for an absolute prohibition against any payment in excess of the amount provided for by such agreement. These subdivisions do not prevent new agreements as to future services, but as to services already rendered, the prohibition against retroactive payments of increased compensation is categorical. No contention is advanced that such a restriction, with respect to a large factor in the acquisition costs of insurance companies, for the benefit and protection of policyholders is unreasonable or arbitrary. The Legislature chose the salutary method of barring all contingent increases in the cost of services already rendered. That method itself interposed a bar effectuated by its own definitive terms. No authorization or occasion was left for applying indefinite standards to determine whether such increases were in any circumstances permitted. No such standards are prescribed.

The provisions involved are not mere statements of general policy or ultimate objective to prevent unreasonable or excessive commissions for the guidance of administrative officers or of the Courts. They constitute an operative prohibition, eliminating uncertainty with respect to insurance expense as to past services. The

consistent responses of New York Insurance Superintendents to a variety of requests for a construction of the prohibition (made a matter of record on the trial, Transcript pp. 188-190) indicate a uniform administrative interpretation that the intent and language of the statute left no room for consideration of questions of reasonableness apart from the agreement of the parties at the time the services were rendered. Such long-standing administrative practice has always been accorded weight, even where doubt and ambiguities affect the statute on its face. It is even more persuasive that clear statutory language is not subject to exceptions of which it gives no evidence whatever.

The administrative view of the legislative intent is buttressed moreover by the continued existence of the statute for over forty years without legislative alteration in its terms. That construction is further stressed by the specific legislative concern with revision and recodification of the Insurance Law through the work of a joint legislative committee, known as the Piper Committee, appointed in 1937. In recommending the revision of the Insurance Law in 1939, that Committee observed that it has become "necessary to extend the language to cover many situations which were not within the language of the prior law" (N. Y. Leg. Doc. 1939, No. 101, p. 7). No occasion was found to alter the provision incorporated into the revised law as Section 213, with respect to its terms as applied over the years or to intervening circumstances or developments. In 1940, when Section 213-a was first enacted covering industrial insurance, the same prohibition in the same terms was incorporated therein.

As a specifically prescribed detail of regulation expressly addressed to the business of insurance, Sections

213 and 213-a would necessarily take precedence over other general provisions of the Insurance Law itself or of other State enactments upon the most elementary principles of statutory construction. Only by direct reference or by inescapable inference that such was the intent could general provisions render ineffectual the precise regulations here concerned.

If application of the statute is made dependent upon whether it could be shown that retroactive payments are excessive or unreasonable in amount without regard to the rates fixed in advance, then the simple salutary legislative prohibition would be thrown into a welter of uncertainty and administrative confusion. No legislative guidance, other than complete bar, is furnished for determination of such questions, and every case would entail individual examination and probable litigation over questions of reasonableness. We submit that the operation of the statutes concerned is not dependent upon any facts other than the payment of amounts in excess of those provided for in advance as compensation for services rendered.

POINT II

The power of Congress over Interstate Commerce in the business of insurance does not of itself invalidate the New York Statutes involved and has been affirmatively exercised so as to sustain them.

When the Supreme Court, in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, was first called upon to sustain the application of a congressional enactment to the insurance business, when conducted interstate, it did so with full recognition of the local interest of the several States in the continued regu-

lation and taxation of the business carried on within their borders. It disavowed, in that decision itself, any effect of the mere existence of national power in the field to strike down the regulation and taxation of insurance by the States, which had been sustained for many years.

The contention, that the commerce power alone and without regard to its exercise by Congress invalidates Sections 213 (7) and 213-a (5) of the New York Insurance Law is based on a citation of general principle that as to subjects of interstate commerce which are national in character and demand uniformity of regulation, the power of Congress is exclusive (*Gloucester Ferry Company* v. *Commonwealth of Pennsylvania*, 114 U. S. 196). That decision concerned transportation and relied on the doctrine that failure of Congress to act required complete freedom from all regulation. The latter doctrine has become of much diminished authority, with increasing recognition of the wide scope for local regulation without impairing uniformity of national control in matters of national concern. In the absence of congressional action, reasonable local regulations of interstate commerce are sustained (see *California* v. *Thompson*, 313 U. S. 109).

The "necessity" for national uniformity put forth by appellees appears to rest principally upon the company's professed desire to keep its commissions uniform throughout the United States. But the mere desire of an insurance company for uniformity in its relation with its agents and the fact that its local business is integrated with business elsewhere does not gain it immunity from regulation by a State wherein it is doing business, or deny the paramount local interest of that State for pro-

tection of its own citizens (*Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 314).

The *Hoopeston* case was decided prior to the *South-Eastern* case but it sustained detailed regulations of insurance operations by the State of New York despite resulting repercussions on business elsewhere, and did so because of the power of the State to protect its own citizens. It presented State regulations under the detailed plan of a long continued local system of the very kind the Supreme Court was careful to indicate would not be stricken down by recognition of Federal power.

Whatever might otherwise be the effect of the existence of the commerce power, Congress was prompt to disavow paramount national interest necessitating uniformity of treatment or exclusive national control by the enactment of Public Law 15 (15 U. S. C. A. 1011, *et seq.*). That act declared that continued regulation and taxation by the several States of the business of insurance is in the public interest and that the silence of Congress is not to be construed as barring such state regulation or taxation. The act then affirmatively provides that the business shall be subject to the laws of the several States regulating and taxing it.

The contention that the commerce power of itself defeats State regulation in any respect would result in a complete absence of regulation in that respect. Because Congress has not acted to regulate itself and has relegated that subject to the field of State action, such a contention would leave without supervision and control in the public interest the very subjects as to which Congress clearly intended to confirm and continue State regulation. The efficacy of the congressional action has been sustained as to taxation in *Prudential Insurance Co. of*

America v. *Benjamin*, 328 U. S. 408 and in *Robertson* v. *California*, 328 U. S. 440 the validity of State regulation was sustained as to acts committed before the McCarran Act became effective, although it was said that act would "dictate the same result."

The statutes here involved are obviously regulations solely concerned with the conduct of insurance and designed to safeguard the interest of members of the New York public who become policyholders of companies doing business therein. They are part of a comprehensive system long in effect. It is plain, we submit, that they were within the competence of the State to enact and that their validity with respect to the existence of Federal authority over insurance has been conclusively established by congressional confirmation of the full scope of State power.

CONCLUSION

The provision of New York Insurance Law, Sections 213 (7) and 213-a (5) should be construed as barring any payment of compensation to agents in excess of amounts determined by agreement in advance of rendition of the service. The statutes should be held not to be invalidated by the interstate commerce clause of the United States Constitution.

April 2, 1948.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York, and
Attorney for Robert E. Dineen, Superintendent of Insurance of the State of New York.

WENDELL P. BROWN,
Solicitor General,

JOHN C. CRARY, JR.,
Assistant Attorney General,

Of Counsel.

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

PHILIP PARIS, MILES A. ROGERS, HERMAN MEYRICH, JOSEPH H. LEVY, HARRY SCHECHTER and NATHAN ROSENBAUM, suing on behalf of themselves and all others similarly situated who may come in and contribute to the expenses of this suit,

Petitioners,

—against—

METROPOLITAN LIFE INSURANCE COMPANY, CECIL J. NORTH and E. J. NICHOLAS,

impleaded with

LEON W. BERNEY.

BRIEF OF METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court is printed on pages 230-244 of the Transcript of Record. The opinion of the Circuit Court of Appeals is reported at 167 F. (2d) 834, and is set forth as Appendix A annexed to petitioners' brief.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on May 10, 1948. The petition for a writ of certiorari was filed on August 7, 1948. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1.

Questions Presented.

On the merits, this case turns on the construction of §§ 213(7) and 213-a(5) of the New York Insurance Law which, as part of a detailed scheme of life insurance regulation, expressly forbid payment to life insurance agents of "any compensation greater than that which has been determined by agreement made in advance of the payment of the premium"* or "in advance of the rendering of such service".†

These statutes have never been construed by any State Court.

The case arises by reason of a provision in a "directive order" of the National War Labor Board that Metropolitan Life Insurance Company should pay certain of its agents a retroactive increase of compensation. The New York Superintendent of Insurance had previously advised the company that the granting of such retroactive increase would violate the

---

* Insurance Law § 213(7) applicable to ordinary life insurance as reenacted in 1939; originally adopted in 1906 as Insurance Law § 97.

† Insurance Law § 213-a(5) applicable to industrial life insurance adopted in 1940.

New York statutes (fols. 342-345).* The parties agreed on the suggestion of the War Labor Board and before its decision to leave this question to the courts (fols. 351-2).

Petitioners, as assignees of agents, instituted the present equity suit in the District Court for a declaratory judgment. The complaint asks that the New York statute be held inapplicable as a matter of construction, and inoperative by reason of the War Labor Board "directive order" (fols. 47-8). Petitioners further asserted in their pleading that the New York statutes were unconstitutional because of the exclusive power of Congress to regulate interstate commerce (fols. 231-232).

The District Court agreed with the petitioners (fols. 706-729).

On appeal the State of New York filed a brief *amicus curiae* attacking the position of the District Court.

The Circuit Court of Appeals unanimously held that since the delicate question of the constitutionality of the statutes and their supersession by the War Labor Board "directive order" would only have to be answered if the statutes were construed contrary to petitioners' views, and since the state courts had never construed these statutes and a construction by the federal courts would not be binding on the State, the case should be remanded to the District Court pending determination by the state courts of the question of construction.

---

* Unless otherwise stated, references are to the Transcript of Record in the Circuit Court of Appeals.

The following question is thus involved on this petition:

1) Whether the Circuit Court of Appeals, in this equity suit for a declaratory judgment, erred in holding that the construction of the State statutes involved should be remitted to the state courts for determination before the federal courts pass upon questions of constitutionality or supersession.

If the writ of certiorari should be granted, the following additional questions will be involved, upon neither of which the Circuit Court of Appeals has passed:

2) Whether §§ 213(7) and 213-a(5) of the New York Insurance Law forbid the retroactive increases of compensation to insurance agents here involved.

3) If so, whether the "directive order" of the National War Labor Board superseded the State statutes and rendered their application unconstitutional.

Statutes Involved.

The chief statutes involved are: New York Insurance Law, Sections 213 and 213-a, the War Labor Disputes Act (10 U. S. C. Secs. 1501-1511), and Public Law 15 (15 U. S. C. Secs. 1011-1014).

Statement.

Defendant Metropolitan Life Insurance Company (hereinafter referred to as "Metropolitan") is a New York corporation engaged in the business of issuing life, accident and health insurance. It is a

mutual company and has no stockholders. Its business has always been managed and its affairs administered from its principal office in New York City. It is operated solely for the benefit of its policyholders, who bear the entire cost of its operations and derive the benefit from any savings (fols. 386-7).

Metropolitan agents, including petitioners, sell both ordinary and industrial life insurance, as well as other forms of insurance issued by the Company. Complying with the statutes, upon appointment by Metropolitan, each agent executes an individual written "agency agreement" defining his duties and specifying in detail the rates of compensation for selling, collecting and conserving insurance (fols. 291, Ex. B-1, fols. 571-609). The rates are uniform for all agents performing similar duties (fols. 402, 698). These individual agreements have continued to be executed since collective bargaining agreements were made with unions representing agents and are specifically referred to and contemplated by all collective bargaining agreements (fols. 291, 457-8, 453, 484, 645-6).

United Office and Professional Workers of America, C. I. O. (referred to as UOPWA) and its affiliate, Industrial Life Insurance Agents, Local 30 (sometimes collectively referred to herein as "the unions") were bargaining representatives for certain agents of Metropolitan. Agents in the New York metropolitan area were organized by Local 30. Agents in New Jersey, Pennsylvania, Illinois, Massachusetts, Michigan and Connecticut were organized by UOPWA. The remainder of the agents throughout the United States and Canada were not represented by these unions and were not parties to the proceedings (fol. 698).

In June 1942, a dispute arose between Local 30 and Metropolitan respecting demands for increased compensation and changes in other working conditions. A similar dispute thereafter arose with UOPWA. In October 1942, the dispute with Local 30 was certified to the National War Labor Board at the instance of the union, the Company expressly refusing to join in the application to the Board (Ex. E, fols. 656-7; Ex. F, fol. 673).

The National War Labor Board took jurisdiction of the dispute.*

While the dispute was being considered by the Board, Metropolitan and Local 30 entered into a collective bargaining agreement resolving all the issues except increased compensation. The collective bargaining agreement signed on May 7, 1943 merely recited the fact that the question of compensation was being considered by the War Labor Board (Ex. 5-A, fol. 443). Thereafter, similar collective bargaining agreements were concluded with UOPWA for agents represented by that organization.

No agreement was ever made by Metropolitan to treat the War Labor Board as arbitrator or to accept its decision as a binding determination, and no such contention or suggestion was ever advanced by the union before the Board (fols. 360-361).

In fact the record is clear the Metropolitan expressly refused to join with the union in asking the

* The War Labor Disputes Act empowered the Board upon certification that a labor dispute could not be settled by collective bargaining or conciliation, "to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute" (Sec. 7(a)(1)).

Board's intervention (Ex. E, fols. 656-7; Ex. F, fol. 673.)

In the course of the hearings before the Board the union demanded that any increase in compensation be made retroactive to the date of certification of the dispute to the War Labor Board. Metropolitan not only denied that there was justification for any increase, but from the first consistently maintained that retroactive increases were forbidden by the New York Insurance Law (fol. 338). The Regional Board recommended both a prospective and retroactive increase. The matter was taken to the National Board (fol. 57), where the dispute with the UOPWA was consolidated with the Local 30 case (fols. 530-532).

Before the National War Labor Board Metropolitan reiterated its position that no increase was warranted and that in any event the New York Insurance Law prohibited the granting of any retroactive increase.

The New York Superintendent of Insurance expressly informed Metropolitan that if it paid any retroactive increases recommended by the War Labor Board such act would constitute a violation of the New York Law (fols. 342, 345). Such violation is a criminal offense under the statute (Insurance Law, Sec. 5).

The War Labor Board was concerned with the genuine problem presented. It doubtless realized that its "directive orders" could not affect legal rights and it did not wish to direct the parties to act contrary to the State statutes. Accordingly, prior to making its decision the National War Labor Board

encouraged the parties to enter into a stipulation which would leave to the courts the legality of the retroactive increase under the New York statutes (fols. 360-5). The stipulation, dated July 19, 1944, provided that if any increase in compensation should be directed by the War Labor Board, collective bargaining agreements so providing would be entered into and Metropolitan would pay the increases *prospectively* (fol. 121), but if the National War Labor Board directed retroactive payment of increases Metropolitan would simply deposit the money in escrow "pending the final determination of an action to be instituted in a court of competent jurisdiction of the question whether the provisions of §§ 213 and 213-a of the New York State Insurance Law constitute a bar to the payment by Metropolitan to its agents of retroactive increased compensation" (fols. 122-3).

On September 18, 1944 the National War Labor Board confirmed the action of the Regional Board by a vote of 7 to 5, directing both prospective and retroactive increases. In accordance with the stipulation, Metropolitan paid the prospective increases and made the escrow deposit.

On January 6, 1945 petitioners, as assignees for certain of the agents, instituted the present suit for a declaratory judgment.

The District Court (Mandelbaum, *J.*), despite defendants' objection that the question of construction should first be passed upon by the state courts (fols. 279-280, 379), proceeded to hand down a decision construing the New York statute in accord-

ance with petitioners' contentions and further holding that to apply the statutes to the situation in the face of the "directive order" of the War Labor Board would be unconstitutional (fols. 694-731).

An appeal was taken to the Circuit Court of Appeals, where the State of New York filed a brief amicus curiae assailing the construction of the statute adopted by the District Court.

The Circuit Court of Appeals unanimously reversed (L. Hand, A. N. Hand and Chase, JJ.), and directed that the questions of constitutionality and supersession should not be determined by the District Court until the state courts had been given an opportunity to pass upon the question of statutory construction.

Argument.

POINT I.

The Circuit Court of Appeals correctly held that the federal courts should refrain from passing upon any constitutional question until the state courts had construed the state statutes.

A. The Decision Was In Accordance With the Authorities.

The decision of the Circuit Court of Appeals followed the well-established principle repeatedly laid down by this Court, that where a plaintiff attempts to invoke the equity jurisdiction of the federal courts to impugn a state law, consideration of the federal

question should be withheld until the state courts have been given an opportunity to construe the state law.

In *Railway Commission of Texas* v. *Pullman Company*, 312 U. S. 496 (pp. 499-501), this Court wrote:

> "* * * But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. * * * the last word on the statutory authority of the railroad commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.
>
> "* * * The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.
>
> "* * * These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. * * *
>
> "This use of equitable powers is a contribution of the courts in furthering the harmonious relations between state and federal authority without the need of rigorous congressional restriction of those powers. * * *

"Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. * * * In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands."

Accord:

Chicago v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168 (1942);
Spector Motor Co. v. *McLaughlin*, 323 U. S. 101 (1944);
Alabama State Fed. of Labor v. *McAdory*, 325 U. S. 450 (1945);
Asbury Hospital v. *Cass County*, 326 U. S. 207 (1945);
A. F. of L. v. *Watson*, 327 U. S. 582 (1946);
Green v. *Phillips Petroleum Corp.*, 119 F. 2d 466, cert. den. 314 U. S. 637.

What is here under attack are two important sections of the New York Insurance Law, which this Court has called "a comprehensive and detailed plan for regulation of all types of insurance" (*Hoopeston Co.* v. *Cullen*, 318 U. S. 311, 314). The history and purposes of the statute are summarized in Point II of this brief.

Petitioners seek to supersede the construction which the Superintendent of Insurance of the State of New York gave to these statutes (fols. 343-345). The State of New York considered the public interest sufficiently concerned to file a brief *amicus curiae* in the Circuit Court of Appeals.

Under the circumstances, the unanimous opinion of the Circuit Court of Appeals as to the proper procedure was inevitable.

B. The Point Was Not Waived By the Parties.

Petitioners now contend that the stipulation between the insurance company and the unions precluded the federal courts from determining for themselves the correct procedure to follow in exercising their equity jurisdiction.

Factually, there is no basis for such a claim. The stipulation merely gave the unions "the *initiative* to choose * * * the forum" (fols. 124-5). This was not a stipulation that defendants could not object if the union chose an inappropriate forum.*

However, even if the parties had expressly agreed that the question of statutory construction should be determined in the Federal Court by suit for a declaratory judgment, such agreement would not be binding upon the courts.

In *Green* v. *Phillips Petroleum Co.*, 119 F. 2d 466, cert. den. 314 U. S. 637, the parties agreed to litigate the construction and validity of the Iowa Chain Store Tax in the Federal Court. The Circuit Court of

---

* Nor is there any evidence in the record, or basis outside the record, for petitioners' irrelevant assertion that the Superintendent of Insurance decided or purported to decide which was the proper forum. The proposed escrow stipulation was submitted to the Superintendent of Insurance, and all he did was to let Metropolitan know informally that he would not object to the execution of that stipulation in the form in which it was later signed. There was never any formal proceeding or hearing before the Superintendent, and he never purported to decide what was the proper forum or to advise the parties with respect thereto.

Appeals remanded, directing the District Court to retain jurisdiction pending a determination by the State Court, writing:

> "* * * This decision of the Supreme Court [*i. e., Railroad Comm.* v. *Pullman Co.,* 312 U. S. 496] requires as we understand it, in a case such as this—where the question upon which the case turns is one of state law as yet undetermined by the courts of the state and affecting an important state policy such as that of taxation—that the federal district court as a court of equity must, in the exercise of a wise discretion and because of ' "scrupulous regard for the rightful independence of the state government" and for the smooth working of the federal judiciary' (Id. p. 645 of 61 S. Ct.,) stay its hands, provided that the situation is such that a definitive determination of the issue of state law may be obtained by the parties through recourse to the state courts. *We gather that the exercise of this discretion is a matter of judicial policy which can not be controlled by the wishes or agreements of the parties litigant"* (p. 649). (Italics ours.)

The granting of a declaratory judgment is always discretionary, and this Court has indicated that such a declaration should not be granted under circumstances, such as are here involved, until the state courts have passed upon the question of statutory construction.

In *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, this Court wrote:

> "The extent to which the declaratory judgment procedure may be used in the federal courts to

control state action lies in the sound discretion of the Court.

"* * * It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the Court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts" (p. 471).

Meredith v. *Winter Haven,* 320 U. S. 228, cited by petitioners, expressly recognized the principle here involved, but held it inapplicable to a case where the highest State Court had already passed upon the question of construction and no discretionary relief or federal question was involved.

Petitioners also attempt to convey the impression that in some way Metropolitan waived the point that the question of construction should be determined by the state courts. Petitioners, after referring to the fact that this point was raised by counsel for Metropolitan at the opening of trial, make the remarkable statement that "the trial continued without any further reference to this subject by counsel", and that petitioners assumed that counsel for Metropolitan "abandoned this contention" (pp. 8-9 of petitioners' papers).

The printed Transcript of Record shows the utter baselessness of these assertions.

Not only did counsel for Metropolitan make the point at the opening of the trial, but he raised and

argued it elaborately again on the motion to dismiss the complaint at the close of the plaintiffs' case (Transcript of Record, pp. 93-94). And he raised the point a third time at the end of the entire case, specifically urging that since "the case involved the construction and application of a State statute not previously construed by the State courts * * * decision in this case await appropriate adjudication by the State courts" (Transcript of Record, p. 127).

The point was briefed in the District Court and on the appeal to the Circuit Court of Appeals, and was raised at every possible stage of the case.

C. The Decision of the Circuit Court of Appeals Is Practical.

The contention that petitioners cannot follow the procedure suggested by the Circuit Court of Appeals is without foundation. Petitioners may go into the New York State courts and obtain a declaratory judgment of the question of state law under the state declaratory judgment provisions (New York Civil Practice Act, § 473; *White* v. *Boland,* 254 App. Div. 356).

This was the procedure suggested by the decisions already cited. (See *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101, 106; *American Federation of Labor* v. *Watson,* 327 U. S. 582, 599.)

Such declaratory judgment procedure was used in *Eline's Inc.* v. *Town of Milwaukee,* 135 F. (2d) 878, where the Circuit Court of Appeals remanded a case to the District Court to be held until determination by the state courts of the question of statutory con-

struction. The plaintiff then went into the State Court and obtained such a declaratory judgment (*Eline's Inc.* v. *Town of Milwaukee,* 245 Wis. 648).

This procedure is a thoroughly sound one to follow in the instant case, for if the New York courts should agree with the petitioners' construction of the New York statutes, there will be no need for the federal courts to pass on the delicate questions of constitutionality or supersedure of state law. On the other hand, if the state courts should uphold the construction adopted by the Superintendent of Insurance there will then be time enough for the federal courts to consider any possible federal questions.

The contention that delay will work an injustice to petitioners is fanciful. The regular or current pay of the agents is not involved, but only a small amount of additional back pay for each individual agent, the maximum net interest of any one agent being $71.15 (fols. 142-174).

The primary consideration is the public interest in protecting policyholders, to whose benefit any savings of this mutual insurance company will redound.

D. The Question of Construction Is the Crucial Question.

Petitioners' belated assertion that this case does not involve any question of statutory construction is negatived by their own pleadings (fols. 20-53, 231-232), the opinions in the Court below and their own arguments.

The case turns on the construction of §§ 213 and 213-a of the New York Insurance Law. In fact, this

was the only question which under the escrow stipulation was to be decided by the courts, *i. e.*, "whether the provisions of Sections 213 and 213a of the New York State Insurance Law constitute a bar to the payment by the Metropolitan to its agents of retroactive increased compensation" (Ex. C, fol. 123).

Whether any Federal question will ever be presented depends on the construction given to these important New York statutes. The Circuit Court of Appeals correctly held that the New York courts were the proper forum to interpret a New York statute.

POINT II.

Sections 213 and 213-a of the New York Insurance Law forbid any retroactive increase in the compensation of insurance agents, regardless of the manner in which such increase is determined.

Subdivision 7 of Section 213, as re-enacted in 1939 relating to ordinary life insurance, provides so far as here relevant:

> "*No such company,* and no person, firm or corporation on its behalf or under any agreement with it, *shall pay or allow to any agent,* broker or other person, firm or corporation for procuring an application for a life insurance policy, *for collecting any premium thereon or for any other service* performed in connection therewith *any compensation greater than that which has been determined by agreement made in advance*

of the payment of the premium * * *." (Italics ours.)

Subdivision 5 of Section 213-a, which was added in 1940 to deal similarly with industrial life insurance, provides:

> "*No such company,* and no person, firm or corporation, on its behalf or under any agreement with it, *shall pay or allow to any agent*, broker, employee or other person, *for services* in procuring an application for industrial life insurance, for collecting any premium thereon or for any other service performed in connection therewith, *any compensation greater than that which has been determined by agreement made in advance of the rendering of such service.*" (Italics ours.)

Petitioners urged in the District Court, and that Court erroneously accepted their argument, that these statutes, despite their unequivocal language, were not intended to apply where the compensation was not "excessive, unreasonable and discriminatory" or where it resulted from a "legitimately decided labor dispute" ending in "collective bargaining agreements" (fols. 709-710). This construction is directly contrary to the uniform interpretation given to the statute by successive Superintendents of Insurance and to the plain legislative history. It would render ineffective the limitations of the statute, and would make practical administration impossible.

The District Court's misconstruction of the statute impelled the State of New York to file a brief *amicus curiae* in the Circuit Court of Appeals.

Origin and Purpose of §§ 213 and 213-a of the Insurance Law.

Sections 213(7) and 213-a(5) are part of an exhaustive legislative code regulating insurance companies doing business in New York. Section 213(7) (or its equivalent, old § 97) has been continuously in effect since 1906, as part of the code adopted on the recommendation of a Joint Committee of the State Legislature, known as the Armstrong Committee, which investigated "the cost of life insurance, the expenses of said companies" and other phases of the business. The counsel for this committee was the late Honorable Charles Evans Hughes.

To control the cost of insurance (of which agents' commissions constitute an important part), strict provisions were adopted for limiting expenses.

On the specific point here involved, the Armstrong Committee recommended as follows:

> "All commissions should be definitely agreed upon in advance and should be a fixed percent of the premium for each $1000. of insurance" (Report of Joint Legislative Committee to Investigate the Business of Life Insurance, Proceedings, vol. 7, p. 306).

Following this recommendation, the Legislature in 1906 adopted *inter alia* Section 97 of the Insurance Law, which contained substantially the same language as the present § 213 (7), forbidding retroactive increases of compensation to agents selling life insurance.

Sections 213 and 213-a are accurately entitled "Limitation of Expenses". Other provisions of the same sections restrict compensation of agents to an even greater degree, by putting a top limit on certain types of commissions, and by forbidding bonuses, prizes, "or any increase or additional commissions or compensation of any kind whatsoever" based upon volume. (See §§ 213 (8), (9) and 213-a(6), (7).)

The statutory purpose is plain: (1) expenses of conducting the insurance business are rigidly controlled for the benefit of policyholders both by providing a ceiling on agents' commissions and by requiring that the amount of their compensation be definitely fixed in advance by agreement; (2) savings for the benefit of policyholders in any year may not be dissipated by payment of additional compensation to agents after the rendition of their services; (3) statutory limitations on expenses may not be evaded by increases paid in a subsequent year on business produced in a prior year; and (4) expenses incurred in one period must be borne by policyholders of that period and not by subsequent policyholders, as would occur if retroactive increases were permissible.

The Uniform Application of the Statute Leaves No Room for Judicial Discretion.

Since 1907, the Superintendents of Insurance, charged with the administration of the statute, have consistently ruled that retroactive increases were absolutely forbidden, regardless of uniformity of treatment or the fairness of the increase.

The rulings are contained in the Transcript of Record (Ex. A, pp. 188-190).

We here quote from two:

> "I think this language was used deliberately to prohibit any added compensation being paid to an agent of an insurance company by any subsequent arrangements made after their original contract was entered into. If it does not mean this, I am at a loss to give this language any force in construing this section * * *." (Extract from letter dated November 20, 1907 to George E. Ide, Pres., Home Life Ins. Co.)

On two other occasions Superintendents ruled specifically that company contracts with agents could not, under the law, be liberalized retroactively:

> "In your letter of September 29, you inquire whether a company would be permitted to liberalize certain features in an old agency contract and make the improved features retroactive. I am of the opinion that in view of the provisions of sub-division 3, section 97, New York Insurance Law, this cannot be legally done." (Extract from letter dated October 7, 1929 to Prudential Life.)

The necessity of an absolute rule not subject to the disintegration of uncertain exceptions is pointed out in the State's brief *amicus curiae.**

The Statute Applies to Collective Bargaining Agreements.

In the District Court petitioners vigorously contended that because the statutes in question were originally enacted in 1906, the Legislature could not have had in mind collective bargaining situations,

* Reprinted in petitioners' papers on this motion at pp. 52-55.

and petitioners succeeded in having the District Court adopt that view.

Actually, however, the entire statutory scheme was re-examined by the New York Legislature in 1937 and 1938 in the light of its impact on the field of collective bargaining by a Joint Committee of the Legislature, known as the Piper Committee, charged with the general revision of the New York Insurance Law, including a study of the "contractual relations of said [life insurance] companies with their policyholders and with their agents" (N. Y. Leg. Ind. 1938, p. 610).

After protracted hearings, the prohibitions on retroactive increases in agents' commissions, originally adopted in 1906 (old Sec. 97), were re-enacted in 1939 as Section 213(7), and in 1940 were *extended* to industrial life insurance (Section 213-a(5)). In so legislating, the Legislature acted with full knowledge of the New York Labor Relations Act (which had been passed in 1937) and with full knowledge that New York agents of Metropolitan (as well as other insurance companies) were represented by labor unions. In fact (as will be shown below), the two unions involved in the instant case were represented at these legislative hearings and actively participated in them.

The proceedings of this Piper Legislative Committee show that the question was raised whether the problems involving the working conditions of insurance agents should be referred to another then functioning legislative committee known as the "Ives Committee" (charged generally with the duty of investigating matters relating to labor relations). Representatives of these unions opposed this, urging that

insurance was a special subject which should be handled exclusively by the Insurance Department. Defendant Berney (one of the escrowees nominated by the unions) then representing Local 30 and now Vice President of UOPWA, stated:

> "Insurance, we think, is not the same as any other normal business. Insurance has no private owner. * * * I think that is behind the revision of the law and of the original law of insurance, that is the Department should be in control, because it is a public institution, for regulation, and we say that if this Department is to regulate insurance, it will have to regulate the very basic element, and that is the contract between the public [*sic*] and the individual actually conducting the business of the company" (p. 220).*

Mr. Berney urged that relations between the companies and their insurance agents should be considered "not so much as a question of labor relations, although it is involved, but as a question of protecting the interests of the public, which is the purpose of every one of the amendments practically, which is the purpose of limiting the expense of insurance * * *" (p. 221).*

At page 222, the chairman asked directly whether the questions involved were not for the Labor Relations Committee. Mr. Berney replied (p. 223), "My position is that the problem cannot be solved by an outside agency effecting control over the head of the Insurance Department * * * because their entire function is set up for the control of the insurance industry."*

---

* These quotations are from the minutes of the Joint Legislative Committee for re-codification of the Insurance Law, October 25 and 26, 1939.

In the light of the foregoing, it cannot be said that the New York State Legislature enacted the sections in question in disregard of their impact on the field of labor relations.

It was the view of organized labor, as voiced by the representatives of the very unions in this case, that in the public interest insurance required special regulation distinct from the general field of labor relations.

The basic purpose of §§ 213 and 213-a of the New York Insurance Law is to protect policyholders and their dependents by limiting the type of agreements that the management may make with insurance agents. This is a fundamental reason why the State has seen fit to regulate in a most detailed manner the contracts that may be made with agents.

What the Legislature feared was pressure by agents upon management with respect to commission arrangements.

If there was danger to policyholders from the pressure of individual agents, such danger would be multiplied when the pressure became collective.

Any assumption that the various provisions limiting agents' compensation are subject to an unexpressed exception for collective bargaining would render meaningless the 1939-1940 legislation and would totally destroy the protection which the Legislature has for so many years given to policyholders.

There Is No Basis for a Quantum Meruit Recovery.

Petitioners advance the contention that the retroactive provisions of the directive order of the War Labor Board may be treated as an arbitration award and that this would not violate the New York statute.

It is unnecessary to decide the latter question since it is clear from the facts that Metropolitan never agreed to arbitration by the War Labor Board. The Board assumed jurisdiction *in invitum* and from the very start Metropolitan denied the legality of a retroactive increase (fols. 656-657, 673, 360-361).

The purpose of the New York statute is that "all commissions should be definitely agreed upon in advance and should be a fixed percent of the premium" (Report of Armstrong Committee, vol. 7, p. 306). Leaving the question of compensation for past services to a subsequent decision of arbitrators would not comply with the statute which requires not merely that there be an agreement made in advance, but that the rate or amount of compensation itself be determined in advance.

Petitioners also argue that, even though the individual agency agreements fixing compensation had not been terminated during the period of the collective bargaining disputes, the agents should not be deemed to have been working under such individual agreements but were entitled to be paid on the theory of *quantum meruit,* and they urge that the decision of the War Labor Board may be considered a determination of the additional amount to which they were entitled on that basis. Petitioners cite *Martin*

v. *Campanaro*, 156 F. (2d) 127, where the Circuit Court of Appeals for the Second Circuit held that in the case of an *ordinary* employer-employee relationship, after a collective bargaining agreement had by its terms expired and a new one was under discussion, employees continuing to work could not be deemed working under the expired agreement, but were entitled to have the Court determine their compensation *ab initio* on the basis of *quantum meruit*.

Martin v. *Campanaro* has no bearing on the present case, except to the extent that the Court there held the "directive order" of the War Labor Board to be without any effect on the legal rights and obligations of the parties.

The *quantum meruit* theory is not applicable here. A contract in the nature of *quantum meruit* can never be implied where there is "an express contract covering the subject-matter . . . or where an express promise would be contrary to law" (*Miller* v. *Schloss*, 218 N. Y. 400, 406-7). Any *quantum meruit* theory, such as applied in the *Campanaro* case, must be ruled out of consideration on both counts in this case:

First, the *Campanaro* case involved a situation where a previous collective bargaining agreement had by its terms expired, and the Court held that during the interim period before a new agreement was signed the employees could not be considered as continuing to work under the old expired agreement, but were entitled to be paid on a *quantum meruit* basis. In the instant case the agents of Metropolitan, including the plaintiffs, were working under the terms of individual written agency agreements which were contin-

uously in effect and in which their compensation was specified. The only dispute was whether there should be an *increase* in compensation. These agency agreements were specifically recognized as being in force by the collective bargaining agreements, and were merely amended prospectively when an increase was ultimately agreed to after the decision of the War Labor Board (Ex. 5 A, fols. 453, 457-8, 484; Ex. D-1, fol. 646).

Secondly, while a *quantum meruit* relationship between the *ordinary* employer and employee, as in the *Campanaro* case, is legally permissible in New York, Sections 213 and 213-a of the Insurance Law forbid *quantum meruit* arrangements in the case of insurance agents by barring payment of "any compensation greater than that which has been determined by agreement made in advance of the payment of the premium" or "in advance of the rendering of such service". Accordingly, under the New York law, the agents were entitled only to such compensation as had been determined by agreement in advance, and the only agreements determining compensation in advance were the individual agency agreements.

The District Court stated that an interpretation of the statutes in accordance with their express language, "would virtually isolate insurance agents as a class from any other labor class" (fol. 713). But this was precisely what the Legislature intended to do in line with its special treatment of all aspects of the insurance business, a treatment fully justified, as the unions themselves recognized in the legislative hearings.

The existence of the National Labor Relations Act does not prevent reasonable police power regulation

by the states, even though such regulation may have the effect of restricting to some degree the field of collective bargaining (*Allen Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 748-9, 751; *Terminal Railroad Association* v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1, 6-7).

Insurance has long been recognized as a business having a special public interest and the states have customarily regulated all aspects of this business, including compensation to agents, which constitutes so important a part of the cost.

Both this Court and Congress have recognized the necessity and propriety of special state regulation in the insurance field (*Hoopeston Co.* v. *Cullen,* 318 U. S. 313; Public Law 15, 15 U. S. C. §§ 1011-1012).

Public Law 15 in its declaration of Congressional policy, stated (15 U. S. C. § 1011):

> "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

The statute (§ 1012) then provides:

> "a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by

any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance* * * *." (Italics ours.)

POINT III.

The directive order of the War Labor Board did not supersede the State law nor render its application unconstitutional.

It has been repeatedly and uniformly held that the National War Labor Board was vested with no power to affect legal rights and that its directive orders were purely advisory and did not have the force of law.

Martin v. *Campanaro,* 156 F. (2d) 127, cert. den. 329 U. S. 759;
Employers Group of Motor Freight Carriers Inc. v. *National War Labor Board,* 143 F. (2d) 145, cert. den. 323 U. S. 735;
National War Labor Board v. *Montgomery Ward Co.,* 144 F. (2d) 528, cert. den. 323 U. S. 774.

These decisions were based on similar decisions of this Court involving the U. S. Railroad Labor Board, in imitation of which the National War Labor Board was created (*Pennsylvania Railroad Co.* v. *United States Railroad Labor Board,* 261 U. S. 72, 84; *Pennsylvania Railroad System Federation #90* v. *Pennsylvania Railroad Co.,* 267 U. S. 203, 215).

Indeed, the courts have held uniformly that there could be no judicial review or injunction regarding

decisions and acts of the National War Labor Board, even if it exceeded its statutory jurisdiction, since its orders were "merely advisory", "do not affect or alter the legal rights of the parties to the labor dispute" and place "no constraint upon the parties to do what the Board may decide they should do, except moral constraint".*

Congress could hardly have intended by implication to give to a Board with purely advisory functions, not subject to judicial review, the power to supersede state laws in a field which the states have always regulated.

As this Court stated in *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 152, 154:

> "Where Congress has not clearly indicated a purpose of precipitating conflict, we should be reluctant to do so by decision.
>
> Local conditions, customs and policies will not be over-ridden without fighting for consideration * * *. Congress has given no indication that it would withdraw all such State authority into the vortex of the war power. Nor should we rush the trend of centralization where Congress has not" (p. 154).

The function of the National War Labor Board was to facilitate, under war conditions, the making *by the parties* of collective bargaining agreements, by bringing public opinion to bear in support of what the Board regarded as a fair basis for agreement. The National War Labor Board decisions had no self-

* Brief of United States in *Employers Group of Motor Freight Carriers Inc.* v. *National War Labor Board,* 143 F. (2d) 145.

operating effect; they were simply a means of putting pressure upon the parties to come to an agreement.

Since the parties could not have superseded state law as to retroactivity by collective bargaining agreements independently made, they had no greater power because the prohibited conduct might have been erroneously recommended by the War Labor Board.

This was recognized by the War Labor Board itself when prior to handing down its decision it encouraged the parties to make a stipulation which left to the courts the question whether the New York statutes were intended to bar a retroactive increase in this case.

The proper courts to decide this question are the courts of the State of New York. Only if the New York courts answer that question in the affirmative will the federal courts find it necessary to pass on the constitutional questions urged in the petition.

CONCLUSION.

The decision of the Court below was correct and the petition should therefore be denied.

Respectfully submitted,

BURTON A. ZORN,
Attorney for Metropolitan Life Insurance Company.

BURTON A. ZORN,
EUGENE EISENMANN,
PHILIP W. HABERMAN, JR.,
Of Counsel.

New York, New York,
September 9, 1948.